

Did claimant suffer an accidental injury which arose out of and in the course of his employment with respondent? Claimant contends that he aggravated and injured a preexisting hip condition when he stepped down from a fork lift, a distance of about 4 inches. Respondent contends the trauma associated with such a small step was no more than a regular activity of daily living. Additionally, respondent contends claimant's

ongoing problems are the natural consequence of claimant's earlier non-work-related automobile accident and resulting hip replacement, and are not compensable.

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed. Claimant is a long-term, 14-year employee of respondent's distribution center. Claimant alleges that on May 11, 2007, while stepping off a fork lift, a distance of 4 to 5 inches, he suffered a traumatic injury to his right hip.

Claimant has had a long history of hip problems. In 1994, while traveling in inclement weather, claimant was involved in an automobile accident. He underwent surgery the day of the accident, involving an open reduction of his pelvis and relocation of his right hip. The surgery was performed by board certified orthopedic surgeon Michael J. Schmidt, M.D. The hip developed avascular necrosis and, in 1996, claimant underwent a total hip arthroplasty. The hip later loosened, and in either 1998 or 1999, claimant underwent a revision procedure to the right hip. Claimant has had discomfort in his right hip since that time.

In 2007, claimant continued under the care of Dr. Schmidt for ongoing hip problems. On March 6, 2007, claimant was seen by Dr. Schmidt, complaining of pain and discomfort in the right thigh and groin area. A bone scan showed only minimal bone activity, with nothing to suggest any significant loosening of the prosthesis. Claimant returned to Dr. Schmidt on March 20, 2007, complaining again of right thigh and groin pain, this time with radiating pain to claimant's right knee. Claimant was placed on Voltaren and Cymbalta for the pain. Claimant was next examined on May 1, 2007. Claimant continued to complain of right hip and groin pain, with the pain worse at night while he was at rest. At that time, he was taking Cymbalta, Lyrica, Diclofenac and Tramadol. Dr. Schmidt diagnosed right lower extremity sciatic pain, longstanding since the automobile accident. Dr. Schmidt and claimant discussed the possibility of claimant going on disability due to this pain.

Claimant was next examined by Dr. Schmidt on May 14, 2007. Claimant advised Dr. Schmidt that he had worked 3 hours the previous Friday and was unable to bear weight on his right hip. There was no mention of a traumatic incident at work involving a fork lift or any other injury description. Dr. Schmidt examined x-rays of the hip and performed an examination. He was unable to find any indication of prosthetic loosening beyond that earlier noted. He diagnosed possible trochanteric bursitis and speculated that walking on concrete may be causing claimant's hip to become resistant to prolonged impact loading.

Claimant was next examined on May 21, 2007, after being off work for a week. Claimant indicated some improvement, with symptoms that would come and go, but were mostly related to weight bearing status. Dr. Schmidt indicated possible early femoral prosthetic loosening following the total right hip revision done years earlier. Claimant complained of pain, worse while working and at night. The examination results and diagnosis remained unchanged. There was still no history of a traumatic incident at work.

Claimant was referred by his attorney to board certified orthopedic surgeon C. Reiff Brown, M.D., on July 12, 2007. The medical history provided to Dr. Brown contained, for the first time, a discussion of the fork lift incident. Dr. Brown was advised that claimant suffered a sudden, severe stabbing pain in the lateral aspect of his hip and thigh and claimant was immediately disabled as far as weight bearing on the right leg. Dr. Brown was also advised that claimant was placed at a desk, after being off work for a week. But claimant was only able to sit at a desk for about 15 to 20 minutes before being required to get up and walk around. Dr. Brown found claimant to be unable to walk without crutches and noted he was avoiding floor contact with the right lower extremity. Dr. Brown also opined that claimant should not be working due to the number of pain medications he was taking and claimant's inability to sit for more than 15 to 20 minutes. He described claimant's accident as a "relatively minor traumatic incident" resulting in "the sudden onset of extreme pain"¹

Claimant was referred by respondent's insurance provider to board certified orthopedic surgeon Phillip L. Baker, M.D., for an examination on August 14, 2007. The history provided Dr. Baker indicated that on the date of accident, claimant stepped off of a lift truck, down about a foot, and had severe pain in the region of his right hip. X-rays from February of 2007 indicated radiolucency proximally about the prosthesis. X-rays taken May 11, 2007, also indicated lucency about the prosthesis proximally. Dr. Baker determined that claimant fully loosened his hip at the time of his step-off impact on May 11, 2007. At the time of the examination, claimant was required to use crutches. He recommended a revision surgery immediately. Dr. Baker issued a followup report on September 10, 2007. In that report, he discusses a surveillance CD taken of claimant on July 11 and July 18, 2007. In the CD, claimant displayed a full capacity of right hip flexion as he worked on a truck. Claimant had his crutches with him, but was not using them. Claimant is also seen walking with the crutches, but was not using them. The crutches were free from the ground, and claimant was fully weight bearing on the right side. Dr. Baker then went on to opine that claimant's injuries to his right hip were nothing more than the activities of daily living. That surveillance CD is not contained in this record.

¹ P.H. Trans., Cl. Ex. 2.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.²

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.³

If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.⁴

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

. . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."⁵

Claimant alleges a traumatic injury on May 11, 2007, when he stepped off a fork lift. Medical records contemporaneous with this alleged incident do not support claimant's contentions. There was no mention of the fork lift in the records for over two months. Additionally, when the incident was first discussed in this record, the description provided Dr. Brown indicated a very severe and painful experience, not one which claimant would likely ignore when first receiving medical treatment with Dr. Schmidt. There is no dispute that claimant has had a long history of right hip problems. The dispute lies with the connection between claimant's work and the ongoing hip pain. This record does not support claimant's alleged injury on May 11, 2007. While there is some support for a

² K.S.A. 2006 Supp. 44-501 and K.S.A. 2006 Supp. 44-508(g).

³ *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

⁴ K.S.A. 2006 Supp. 44-501(a).

⁵ *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); *citing Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

long-term aggravation from claimant's ongoing work on concrete floors, claimant has not alleged a series of injuries from work. This Board Member cannot find that claimant suffered the accidental injury on May 11, 2007, as alleged. Therefore, the denial of benefits by the ALJ is affirmed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁶ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

Claimant has failed to prove that he suffered an accidental injury which arose out of and in the course of his employment with respondent on the date alleged. Therefore, the denial of benefits by the ALJ is affirmed.

DECISION

WHEREFORE, it is the finding, decision, and order of this Appeals Board Member that the Order of Administrative Law Judge Bryce D. Benedict dated October 3, 2007, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of January, 2008.

BOARD MEMBER GARY M. KORTE

c: Bruce Alan Brumley, Attorney for Claimant
James C. Wright, Attorney for Respondent and its Insurance Carrier
Bryce D. Benedict, Administrative Law Judge

⁶ K.S.A. 44-534a.